

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1011

*To be argued by*  
FEDERICO E. VIRELLA, JR.

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1011

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

JOHN GWYNN,

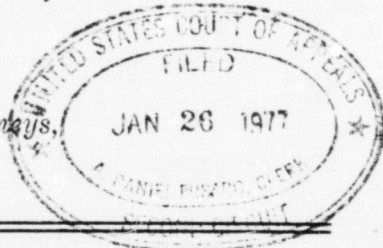
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

FEDERICO E. VIRELLA, JR.,  
DOMINIC F. AMOROSA,  
LAWRENCE B. PEDOWITZ,  
*Assistant United States Attorneys,  
Of Counsel.*



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**BRIEF FOR THE UNITED STATES OF AMERICA**

**Preliminary Statement**

John Gwynn appeals from a judgment of conviction entered on December 3, 1975, in the United States District Court for the Southern District of New York, after a five-week trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 75 Cr. 684, filed on July 10, 1975, in seventeen counts, charged Gwynn and eighteen other defendants with conspiracy and substantive violations of the Federal narcotics laws.\* Count One charged Gwynn

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\* The other defendants named were Joseph Magnano, a/k/a "Joe the Grind", Frank Pallatta, a/k/a "Bolot", a/k/a "Nose", Richard Bolella, Anthony DeLutro, a/k/a "Tony West", Anthony Soldano, Frank Lucas, Louis Macchiarola, a/k/a "Red Hot", Michael Carbone, Dominic Tufaro, a/k/a "Donnie Boy", Frank Ferraro, a/k/a "Skooch", Carmine Margiasso, a/k/a "Charlie", Joseph Malizia, a/k/a "Patsy Pontiac", Ernest Malizia, William

[Footnote continued on following page]

and the others with conspiracy to violate the Federal narcotics laws from January 1, 1973 until July 10, 1975, the date of the filing of the indictment. Count Ten charged Gwynn with possessing with intent to distribute approximately one-quarter kilogram of heroin in or about March, 1973. Count Fourteen charged Gwynn with distributing and possessing with the intent to distribute 159.5 grams of cocaine on or about October 30, 1973. Count Fifteen charged Gwynn with distributing and possessing with intent to distribute 151.5 grams of cocaine on or about December 20, 1973. And Count Sixteen charged Gwynn with distributing and possessing with intent to distribute 148.5 grams of heroin on or about January 15, 1974.

Trial commenced before Judge Cooper on September 22, 1975 against Gwynn and the other defendants.\* On October 24, 1975, the jury found Gwynn guilty on Counts One, Ten and Sixteen. The jury was unable to reach a unanimous verdict as to Gwynn on Counts Fourteen and Fifteen.\*\*

On December 3, 1975, Judge Cooper sentenced Gwynn to a term of eight years' imprisonment on Counts One,

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Chapman, a/k/a "Chappy", St. Julian Harrison, Gerard Cachoian, a/k/a "Coco", Roberto Rivera, and Gabriel Rodriguez, a/k/a "Cass", a/k/a "Cassanova".

\* At the time of trial, defendants Macchiarola, Carbone, Tufaro, Ferraro, Margiasso, Joseph Malizia, Ernest Malizia and Rodriguez were, and remain, fugitives from justice. Defendants Caravella and Harrison were severed on consent. Prior to trial Cachoian pleaded guilty to Count Eleven. On the second day of trial, defendant Rivera pleaded guilty to Count Twelve.

\*\* The jury found Magnano, Pallatta, DeLutro, Soldano and Lucas guilty on all counts in which they were charged. The jury also found Bolella guilty on Counts One and Four, but was unable to reach a verdict as to him on Counts Two and Three. The jury was unable to reach a verdict as to defendant Chapman.



Ten and Sixteen, the sentences to run concurrently, to be followed by three years special parole term.\*

Gwynn was remanded after the jury's verdict and is currently in custody.\*\*

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\* Judge Cooper sentenced Magnano and Pallatta to fifteen years' imprisonment each on Counts One through Four, the sentences on Count One and Two to run consecutively, and the sentences on Counts Three and Four to run concurrently with those on Counts One and Two, to be followed by three years' special parole. Bolella was sentenced to ten-years' imprisonment on Counts One and Four, the sentences to run consecutively, to be followed by three years' special parole. Judge Cooper sentenced DeLutro as a second federal narcotics felon to twenty-five years' imprisonment on Counts One and Eight, the sentences to run concurrently, to be followed by six years' special parole. Soldano was sentenced to fifteen years' imprisonment on Counts One and Nine, the sentences to run concurrently, to be followed by three years' special parole.

On January 27, 1976, Judge Cooper sentenced Lucas as a second federal narcotics felon to twenty years' imprisonment on each of the four counts on which he was found guilty, the sentences on Counts Six and Seven to run concurrently with each other and consecutively to the sentences imposed on Counts One and Five, to be followed by six years' special parole. Lucas was also fined \$50,000.00 on each of the four counts.

\*\* Gwynn's appeal was originally dismissed by this Court's order of April 22, 1976. Subsequently, by order dated May 18, 1976, Gwynn's appeal was reinstated. Gwynn was given until July 22, 1976 to file his brief and appendix. Upon application, this Court on July 19, 1976, granted Gwynn an extension of time to file his brief and appendix until September 1, 1976. On September 3, 1976, this Court denied a motion by Gwynn's counsel for permission to withdraw as counsel upon the ground that appellant's appeal would be totally lacking in merit. On October 4, 1976, this Court ordered that Gwynn file his brief and appendix on appeal on December 6, 1976. On December 15, 1976, this Court granted Gwynn an extension of time until December 27, 1976, to file his brief and appendix.

## Statement of Facts

### The Government's Case

During the course of trial, the Government's evidence, presented through the testimony of 17 witnesses and approximately 82 exhibits, established that from February, 1973 until July 10, 1975, the date of the indictment, Gwynn and his co-conspirators participated in a conspiracy to distribute massive amounts of heroin in the New York metropolitan area. Co-defendants Magnano, Pallatta, Bolella, DeLutro and Soldano, and other defendants who remain fugitives supplied co-conspirators Mario Perna and Anthony Verzino and defendant Ernest Malizia \* with large amounts of heroin from late February, 1973 through January, 1974. Perna, Malizia, and Verzino, the core members of the conspiracy and partners in a narcotics enterprise, in turn sold this heroin to numerous customers on an almost daily basis, one of them being the appellant Gwynn, who in turn distributed the narcotics to others.\*\*

#### A. The Perna-Malizia Partnership Is Supplied Heroin by the Pallata Organization and the Heroin Is Re-Sold to Gwynn

On May 5, 1972, Mario Perna \*\*\* was released from Atlanta Federal Penitentiary after completing a sen-

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\* Ernest Malizia was also a fugitive from justice during the trial and remains so. Perna and Verzino testified for the Government at trial.

\*\* For a full and complete discussion of how this conspiracy operated, see Government's brief on appeal in *United States v. Magnano, et al.*, Dkt. No. 76-1011, and this Court's decision affirming Gwynn's co-defendants' convictions in *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976).

\*\*\* Perna pleaded guilty to related narcotics charges prior to trial.

tence for a federal narcotics conviction. In late February, 1973, Perna went to the Evergreen Bar in Brooklyn, New York where he met with Ernest Malizia, whom he had known for a number of years. (Tr. 452-53).<sup>\*</sup> Perna and Malizia agreed to get back into the narcotics business.

Over the next several days, the two men attempted to locate a source of supply for heroin. They finally met with Pallatta with whom Malizia had had prior narcotics dealings.

A few days later, Pallatta, after consulting his partners, told Perna and Malizia at the Adventurer's Inn that heroin would be delivered to them by a man named "Skooch" at the Allerton Theatre on Allerton Avenue in the Bronx. Sometime later, Perna and Malizia met Skooch at the pre-arranged spot where Skooch told Perna and Malizia that the bag he gave them contained two "packages" which the parties understood to mean two kilograms of heroin. (Tr. 454-89).

After diluting the Pallatta heroin and being satisfied with the quality of the heroin,\*\* Perna and Malizia were unsuccessful in their attempts to sell it in bulk so they decided to sell it in one-eighth and one-quarter kilogram quantities to a number of customers. (Tr. 485-89).\*\*\* During the next several days in March, 1973, Perna and Malizia went to see Gwynn, who Perna had

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<sup>\*</sup> "Tr." refers to the trial transcript; "GX" to Government's Exhibits; and "Br." to appellant's brief on appeal.

<sup>\*\*</sup> Perna tested its potency by having an addict named Flaco inject it. (Tr. 480-83).

<sup>\*\*\*</sup> Some of these customers, in addition to Gwynn, were Flaco, Joseph Condello, and two persons Perna knew as "Joe" and "Cass." (Tr. 495-510).



known for a number of years, at Gwynn's apartment at 1065 Jerome Avenue in the Bronx.\*

Malizia asked Gwynn if he was interested in purchasing narcotics. Gwynn said he was. Gwynn asked what it would cost for a quarter kilogram of heroin and was told \$8,000. Perna and Malizia told Gwynn that he should take a half kilogram for \$15,000 as they had confidence he could sell it. Gwynn agreed to this arrangement. Perna and Malizia left, returned to their stash, prepared a half kilogram package of heroin, returned to Gwynn's apartment and gave Gwynn the half kilogram on consignment. Gwynn said he would have the money in a day or two. (Tr. 495-507).

A short time later, Perna and Malizia returned to the Adventurer's Inn and met with Pallatta, Skooch and "Donnie Boy" (Dominic Tufaro) to pay for the two kilograms. Since Perna and Malizia did not have all of the money, it was agreed to meet again in a few days. In the interim, Perna and Malizia visited their heroin customers, including Gwynn, to pick up money. Thereafter, Perna and Malizia met Pallatta and his group to pay some of the cash owed on their account. (Tr. 510-16, 539-42, 547-48).

Sometime later, Perna and Malizia met with Pallatta at the Adventurer's Inn where they paid him an additional \$20,000 and asked him for four more kilograms of heroin which Pallatta agreed to supply in the same manner as earlier. A day or so later Skooch gave them a bag containing four kilograms of heroin at the Allerton Theatre. (Tr. 547-52).

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\* "It was stipulated during the course of the trial that during 1973 and 1974 Gwynn resided at 1065 Jerome Avenue, Apartment 5-C, in the Bronx. (Tr. 2898).

Over the next several days, Perna and Malizia went on their regular narcotics route visiting Gwynn and other regular customers to collect money and to determine whether Gwynn and the others wanted more heroin, and, if so, to supply it. (Tr. 552-53). By late March, 1973 Perna and Malizia were still dealing with Gwynn who purchased additional heroin from them. (Tr. 572).

Subsequently from late March, 1973 through the early part of August, 1973 Perna and Malizia continued to receive large quantities of heroin from the Pallatta organization which was resold to their customers. During this period of time, Perna and Malizia regularly met with Gwynn and others for the purposes of collecting money owed and delivering additional heroin which they had obtained from Pallatta, Magnano and their associates. (Tr. 655).

#### **B. Anthony Verzino Joins The Perna-Malizia Heroin Partnership**

In September, 1973, Verzino, who had recently been released from Atlanta Federal Penitentiary, joined the existing Perna-Malizia \* partnership. After being told by Perna and Malizia from whom they were getting heroin and at what prices, Verzino stated that he knew these people for a long time and would talk to them personally about a price reduction, especially Bolella with whom he got along very well. (Tr. 647-48). Verzino thereafter obtained new heroin customers and began

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\* Verzino had known both men for many years. (Tr. 1843-46). Moreover, Perna told Verzino that they had gotten the narcotics from some "old friends" of Verzino, namely Pallatta, Magnano and Bolella, who Verzino had known nearly all his life and with whom he had narcotics dealings prior to his incarceration in 1966. (Tr. 647-48, 1848-49, 1863-71).

assisting in servicing Perna's and Malizia's regular customers, including Gwynn, Lucas, and others. (Tr. 464-47, 650-55). During the latter part of 1973 and into January, 1974, the partnership obtained more heroin from Anthony DeLutro, from the Pallatta organization, and from Anthony Soldano. (Tr. 676-80, 765-89, 832-35, 1931-55, 1997-2000, 2034-42).

During this period, too, Perna, Verzino and Malizia continued to deliver heroin to their customers, including Gwynn. When Verzino was first introduced to Gwynn by Perna in October, 1973, Gwynn handed Malizia \$15,000, which Malizia entered in his tally sheet. Gwynn then offered to sell Malizia pure cocaine at a price of \$20,000 per kilogram, but Malizia complained that the price was too steep. Later, on two occasions, Verzino collected from Gwynn money owed for narcotics. (Tr. 794-95, 1876-87, 1896-1900).\*

### **C. Gwynn's Dealings with the Purchased Narcotics**

The Government's proof of Gwynn's membership in this conspiracy did not rest on the testimony of Perna and Verzino alone. Special Agent Joseph P. Salvemini testified that on January 9, 1973, while working in an undercover capacity, he was introduced to Gwynn at the Gallery Bar in the vicinity at 150th Street and Broadway in Manhattan by Louis Fragliosi, a confidential inform-

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\* Joseph Brzostowski, a Special Agent of the Drug Enforcement Administration, testified that on January 16, 1974, while conducting surveillance on Perna, he followed him to an apartment building at 1065 Jerome Avenue in the Bronx, which Perna entered. (Tr. 1431-35). At that time, Gwynn lived in apartment 5-C of that building. (Tr. 2898).

ant.\* Gwynn told Salvemini that the Gallery Bar was used by many of Gwynn's friends to transact narcotics deals and that he had access to ten kilograms of pure heroin. Salvemini asked Gwynn how much Gwynn wanted for one kilogram and Gwynn said \$40,000. After Salvemini agreed to purchase one kilogram, arrangements were made for a sale the next evening. This was the last time that Salvemini saw Gwynn. (Tr. 1620-30).

John Vasquez testified that in July, 1973 he received a one week furlough from Greenhaven state prison \*\* during which time he visited Gwynn at his home, 1065 Jerome Avenue, Apartment 5C, in the Bronx, and at the Gallery Bar in 151 Street and Broadway.\*\*\* There, at the bar, a man known as Farrell came up to Gwynn and gave him a package of bills which Gwynn asked Vasquez to hold. After Farrell left the bar, Gwynn and Vasquez retired to the kitchen where they sniffed some cocaine supplied by Gwynn and where Gwynn took the money, counted it, and stated that he might have to cut Farrell loose, because Farrell was not taking care of his end of the business. Vasquez understood this to mean that Farrell was Gwynn's partner in the narcotics business. (Tr. 1633-39).

On August 16, 1973, Vasquez was released from Greenhaven State Prison and later in October of that year he met Gwynn at his Bronx apartment where Gwynn agreed to make Vasquez a partner in Gwynn's narcotics

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\* A few days prior to this meeting Salvemini had driven Fragliosi to the vicinity of 1065 Jerome Avenue where he later saw Fragliosi speak to Gwynn. (Tr. 1621-23).

\*\* Vasquez was then serving a fifteen to life term for attempted robbery in the third degree. (Tr. 1633). Prior to trial Vasquez pled guilty to possession of cocaine with intent to distribute.

\*\*\* Vasquez further testified that Gwynn was also known as "Johnny Q" and "JQ". (Tr. 1679).



business. Gwynn then took Vasquez to the kitchen \* where he gave Vasquez two ounces of cocaine and showed him how to "cut" and mix the cocaine with milk sugar.\*\* Before Vasquez left the apartment, Gwynn told him that his cost for the cocaine was \$2,200 for an eighth and that Vasquez could charge between \$3,000 to \$3,500, with the profit being split down the middle. (Tr. 1640-45).

During October 1973, Vasquez met a man named Tony Finn at an after hours bar on 13th Street in Manhattan.\*\*\* Finn expressed interest in buying some cocaine, and Vasquez sold Finn two ounces of cocaine for \$1500. Over the next few days Vasquez contacted Gwynn about Finn's desire to buy an eighth of cocaine. Gwynn agreed and told Vasquez that he would supply high quality cocaine.

Shortly thereafter, Vasquez contacted Finn and set the price of the cocaine at \$3,200. Later, Vasquez arranged a meeting between Finn and Gwynn to take place at the Gallery Bar in late October.\*\*\*\* While at the

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\* In the kitchen, Gwynn took out from the cupboard, a jar of milk sugar, tin foil containing cocaine, spoons, a scale, playing cards, and plastic bags. (Tr. 1642).

\*\* Vasquez testified that Gwynn took out weighing scales to measure eight quarter spoons of cocaine which weighed two ounces. Gwynn then took three ounces of milk sugar and proceeded to mix both the cocaine and milk sugar on a piece of tin foil, using the two with playing cards. Gwynn then sifted the mixed products through the strainer several times. (Tr. 1641-44).

\*\*\* Finn was working as an informant with the Drug Enforcement Administration. (Tr. 1739). He was killed prior to trial. (Tr. 1725).

\*\*\*\* Prior to meeting Vasquez at the bar, Finn met with Special Agents Michael Patterson and Thomas Smith of the Drug Enforcement Administration who gave him \$3200 of Official Advance Funds for the purposes of purchasing the cocaine. Also, at this time, Finn was outfitted with an electronic transmitting device which Finn wore on his person. (Tr. 1741-42).

Gallery, Vasquez telephoned Gwynn's apartment, since he had not appeared at the bar. During the phone conversation, Gwynn told Vasquez to bring Finn up to his house to conclude the transaction.

After the phone call, Vasquez drove to Gwynn's apartment in the Bronx as Finn followed in another car. Upon arriving in the area, Vasquez and Finn went to Gwynn's apartment, where Gwynn weighed a bag containing four ounces of cocaine. Finn then gave \$3,000 to Gwynn who proceeded to put the cocaine bag inside a Seagram cloth bag. Finn left the apartment with the cocaine, while Vasquez remained in the apartment for a few minutes at which time Gwynn gave him \$400 and instructed him not to bring anyone up to the apartment to conduct business in the future.

Vasquez then left and met Finn who gave him the remaining \$200. (Tr. 1645-58). The two men then separated, and Finn turned over the cocaine to agents of the Drug Enforcement Administration. (Tr. 1645-58, 1739-49; GX 50).

During December, 1973, Vasquez, after meeting with Finn, agreed to supply another eighth of cocaine. Thereafter, Vasquez contacted Gwynn who agreed to sell another eighth kilogram of cocaine for \$4,000, but he stated that Vasquez should get the money up front before doing the deal. Vasquez then met Finn at his Morning-side Drive apartment. Vasquez phoned Gwynn, who said that if Finn had the money, he should be brought to the Bronx apartment. Before leaving the area, Finn introduced Vasquez to Special Agent William Simpson, who was posing at a narcotics purchaser. (Tr. 1751-52).

The three men then drove to Jerome Avenue and 165th Street where Finn gave Vasquez \$4,000 and Vasquez

got out of the car and walked to Gwynn's apartment. In the apartment, Gwynn gave a package of cocaine to Vasquez who in turn gave Gwynn the money. Vasquez then left the apartment, returned to the car and gave the package of cocaine to Finn. (Tr. 1751-62; GX 51). During the drive back to Manhattan, Agent Simpson asked Vasquez if he could supply heroin. Vasquez replied that he would contact Gwynn about the proposal. (Tr. 1658-73).\*

During January 1974, Vasquez arranged with Gwynn to sell an eighth kilogram of heroin to Finn and Agent Simpson. In the middle of January, pursuant to a pre-arrangement, Vasquez met with Finn and Simpson in Vasquez' apartment. After Vasquez telephoned Gwynn, the three men then left Vasquez' apartment and drove to the vicinity of Jerome Avenue and 165th Street in the Bronx where they parked. Before leaving the car, Vasquez received \$6,000 from Finn and then proceeded to Gwynn's apartment. Inside the apartment, Gwynn gave Vasquez the eighth kilogram of heroin in a bag which was further placed in a brown paper bag. Vasquez in turn handed Gwynn \$6,000. Gwynn then accompanied Vasquez to the apartment door from where Vasquez noticed someone looking out over the staircase landing in their direction.\*\* Vasquez then returned to the car

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\* Later, during the month of December, 1973, Vasquez received another eighth of a kilogram of cocaine from Gwynn at the Gallery Bar. (Tr. 1674-76).

\*\* Special Agent Kieran Kobell of the Drug Enforcement Administration testified that on January 15, 1974, he was conducting surveillance inside 1065 Jerome Avenue, Bronx, New York. During the course of this activity he observed John Vasquez enter apartment 5C and later leave. When Vasquez left, Kobell saw him talking with Gwynn in front of the door to the apartment. (Tr. 1831-36).



where he gave the package of heroin to Finn. The men then drove back to Manhattan. (Tr. 1677-89, 1762-71).

During the remaining part of January, 1974, Vasquez met with Gwynn on numerous occasions. One such occasion, Vasquez went up to Gwynn's apartment to pay \$3,000 he owed Gwynn.\* At that time, Gwynn told Vasquez that he should pay the rest of the money he owed to Gwynn, because Gwynn owed \$30,000 to his people. (Tr. 1691-93).\*\*

**D. The Arrest of Malizia and the Seizure of a Coded List of Phone Numbers of Customers, Including Gwynn**

On December 18, 1973, Ernest Malizia was arrested as a fugitive and thereafter remanded in lieu of \$750,000 bail. In his possession at the time of his arrest was a coded list of phone numbers, including Gwynn's home phone number. Also included in this list was Frank Lucas' phone number. (Tr. 1425-28, 1494-1501, 1617-18, 2875, 3581-82; GX 9).

Abbreviated references to Gwynn, Frank Lucas, Joseph Magnano, and Frank Pallatta, also appeared in other documents seized from Malizia.

**E. Perna Has Gwynn's Phone Number and a Heroin Customer List When He Is Arrested**

On February 1, 1974, Perna was arrested in New Jersey by federal authorities. At the time of his arrest,

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\* Gwynn also gave Vasquez a pure ounce of cocaine for \$1500 claiming that it could be diluted into an eighth kilogram of cocaine. (Tr. 1693).

\*\* Vasquez also testified that on one occasion in early 1974 he saw Perna in Gwynn's apartment. (Tr. 1714-16).

Perna had in his possession eight kilograms of diluted heroin. Perna testified at trial that these eight kilograms "were either part of the five kilos we got from Tony West [*i.e.*, DeLutro] or three that come from a fellow by the name of Tony out of Long Island [*i.e.* Soldano]". (Tr. 1195). The arresting officers also seized from Perna a list of telephone numbers and a piece of paper listing his heroin transactions. (GX 1, 2; Tr. 837-39, 847-48, 856-57, 1194-95). Included on the phone number list was Gwynn's then phone number next to the letter "Q". (GX 2; 860-61, 864, 2875-76, 3581-82).

Perna's narcotics worksheet (GX 1) reads as follows:

"Frank	—	3.10
Gun	—	9.
Ida	—	31.
R.R.	—	
Coco	—	5.
Q	—	28.
Chino	—	8.5
Big J	—	10.
Pee W	—	
Luck	—	
Skinny	—	18.8
Cas	—	18.5
Cockeye	—	13.
Owe F.B		333."

Perna testified that the notation "Q—28." meant that Gwynn owed him \$28,000. (Tr. 850-51, 853). Perna also testified that the notation "Owe F. B 333." meant that he owed Pallatta, who he knew as "Frank Bolot" (Tr. 465), \$333,000 for heroin previously purchased. (Tr. 855).

## **F. Verzino Is Arrested**

On February 25, 1974, Verzino and Caravella \* were arrested in front of 1130 Pelham Parkway in the Bronx. At the time of his arrest, Verzino had in his possession a phone book which contained Gwynn's telephone number. (Tr. 2077-88, 2665-68, 2876; GX 45).\*\*

Verzino also identified a paper seized from his person at the time of his arrest as a narcotics customer list listing the amounts of money owed to him. There were entries for Gwynn and others. (Tr. 2056-62, 2665-68; GX 36). The entry for Gwynn was "QUINN-4," reflecting that Gwynn owed him \$4,000. (Tr. 2059-61; GX 36).\*\*\*

## **The Defense Case**

Gwynn testified in his own behalf.

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\* After Perna's arrest, Verzino took Caravella on as a partner telling him the names of the heroin connections and customers. (Tr. 2042-48).

\*\* Gwynn's number was next to the name "J. Quinn." In addition, the phone book contained telephone entries corresponding to Bolella, De Lutro, and Lucas' phone numbers. (Tr. 2077-88; GX 45). Law enforcement officers also seized a small phone book from apartment 4J on the night of Verzino's arrest. Verzino identified the book as containing a list of customers and money owed from each, and said the list was not current. (Tr. 2100-03, 2493-94; G X46).

\*\*\* Law enforcement officers seized from Caravella at the time of his arrest a paper which the Government contended was almost identical with Verzino's customer list. (Tr. 2667-68; GX 42). The paper found on Caravella had an entry "gynn-4", which the Government contended corresponded to the \$4,000 Gwynn owed Verzino.

He admitted that in 1958 he pleaded guilty to manslaughter in the first degree.\* (Tr. 3540).

Gwynn testified that in August, 1973 Perna and Malizia, both of whom Gwynn knew from state prison, came to Gwynn's apartment. Gwynn claimed that when Perna asked him whether he wanted to get into the narcotics business, Gwynn told him that he did not want anything to do with narcotics. Gwynn alleged that when he said this, Perna became upset and called Gwynn a "stupid Puerto Rican". (Tr. 3549-52).

Gwynn also claimed that in late, 1973 or early, 1974, Perna, together with Verzino, again went to his apartment and Perna asked Gwynn if he wanted to buy narcotics. Gwynn said he again refused. Gwynn testified that Perna responded by telling Gwynn that Gwynn "was going to get his". (Tr. 3552-54).

Gwynn further testified that in early 1974 Vasquez asked him to sell some cocaine but that he refused to do so. Gwynn also denied that he had narcotics dealings with Perna, Malizia, Verzino or John Vasquez or that he ever met Special Agent Salvemini in the Gallery Bar and discussed narcotics with him. (Tr. 3555-59).

On cross-examination, Gwynn denied ever seeing Salvemini in January, 1973 at the Gallery Bar and denied ever having a conversation with Salvemini concerning the sale of a kilogram of heroin for \$40,000. (Tr. 3577-78). Gwynn also denied that he ever met Tony Finn in his apartment in October, 1973. (Tr. 3586).

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\* The Government represented prior to the time Gwynn took the witness stand that it would not use Gwynn's prior narcotics conviction to impeach his credibility and, therefore, it was not disclosed to the jury.



## ARGUMENT

### POINT I

#### **There Was More Than Sufficient Evidence of Gwynn's Participation in the Conspiracy.**

Gwynn contends that there was insufficient evidence linking him to the conspiracy and therefore his conviction on that count should be reversed. His argument is meritless.

In *United States v. Magnano*, 543 F.2d 431, 433 (2d Cir. 1976), this Court held that the evidence at this very trial established a narcotics conspiracy network which "in broad outline assumed the customary structure of suppliers, distributors, and retailers."

The core members of the conspiracy—the distributors—were Mario Perna, Ernest Malizia, and Anthony Verzino, who as a group bought large amounts of heroin from supplier co-conspirators for resale to the retail members of the conspiracy. *United States v. Magnano, supra*.

Since this Court has already found that such a conspiracy existed, only slight evidence was necessary to link Gwynn to it. See *United States v. Head*, Dkt. No. 76-1249, slip. op. 647, 653 (2d Cir., Nov. 29, 1976); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); see also *United States v. Braasch*, 505 F.2d 139, 148 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

The evidence that Gwynn functioned on the retail level of the conspiracy as a buyer from the core group was not only more than slight, it was overwhelming. From

March through August, 1973, Gwynn purchased, along with others, large amounts of heroin on numerous occasions from Perna and Malizia, after they had bought it from other members of the conspiracy.\* (Tr. 495-507, 552-53, 655). See *United States v. Magnano, supra*. When Verzino joined the Perna-Malizia partnership in August or September 1973, Gwynn continued to receive, on a regular basis, deliveries of heroin from this group until all three were arrested late in 1973 and early in 1974. (Tr. 646-47, 650-55, 794-95, 1896-1900).

Thus, there was more than enough proof from which the jury could find that Gwynn's participation was that of a major heroin customer of the core group functioning on the retail level of the conspiracy. *United States v. Magnano, supra*.

That Gwynn never met the heroin suppliers to the core group is immaterial, for as this Court has stated:

"It is firmly settled in this Circuit that when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performance of others whose identities he may not even know."

*United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). See *United States v. Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Malah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Tramunti*, 513

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\* Gwynn's first purchase of heroin from Perna and Malizia was in March, 1973 when he bought 1/2 kilo for \$15,000. (Tr. 495-507).

F.2d 1085, 1106 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Sperling*, 506 F.2d 1323, 1340-43 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). See *United States v. Sir Kue Chin*, 534 F.2d 1032 (2d Cir. 1976); *United States v. Magnano*, *supra*, 543 F.2d at 434.

Gwynn's reliance on *United States v. Koch*, 113 F.2d 982 (2d Cir. 1940), and *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975), is misplaced. These cases dealt with the singular acts of defendants who had no other connection to the conspiracy. Here, the evidence showed that Gwynn was a regular heroin customer of the core members of the conspiracy, who purchased large amounts of heroin on numerous occasions for subsequent sale to others.\* As such, he was clearly linked to the conspiracy. *United States v. Magnano*, *supra*.

## POINT II

### **The Trial Court's Dismissal of a Juror during the Trial Did Not Prejudice Gwynn.**

Gwynn claims his right to be tried by an impartial jury was violated in connection with the trial court's dismissal of an alternate juror for a violation of an order that all jurors were to remain in the jury room during recesses and not go into the public hallway adjacent to the courtroom. His argument is based on fiction and is frivolous.

On October 15, 1975, counsel for one of Gwynn's co-defendants informed the court that his client observed

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\* John Vasquez, a Government witness, was one of Gwynn's own heroin customers. In January, 1974 while Gwynn was buying heroin from the core group, he sold 1/8 kilo of heroin to Vasquez. (Tr. 1677-89).



one of the alternate jurors talking with a Special Agent of the DEA by a public telephone booth during a recess. (Tr. 2937).

Shortly thereafter, the Court questioned the juror on the record in the presence of all counsel in the robing room. (Tr. 2944-49). During this questioning the juror admitted that notwithstanding the court's instructions that the jurors were not to use the telephone in the hallway adjacent to the courtroom except in an emergency, he had done so because he defined "emergency as my being stir crazy. . . ." (Tr. 2945). The jurors also admitted that he had been warned on three occasions by the court clerk not to leave the jury room. (Tr. 2945-46). In connection with the allegation that he was seen talking to a Special Agent, the juror said that this was not so. He said that during the recess he did ask Gwynn's attorney and one of the Assistant United States Attorneys when the trial was to reconvene and how much longer it was going to take. (Tr. 2944-49).\*

When the juror was excused from the robing room, the court decided to dismiss him from the panel for disobeying the court's instructions not to use the telephone in the public hallway.\*\* No objection was made to this procedure; no counsel suggested any other questions be asked or investigation be undertaken in connection with the incident; no counsel questioned the juror's veracity; no counsel suggested that his client had been prejudiced;

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\* The Assistant stated, and the juror confirmed, that when the juror asked this question, the Assistant did not respond. (Tr. 2941, 2946-47).

\*\* Before leaving the robing room the trial court ordered the juror not to discuss what transpired with his fellow jurors. (Tr. 2948-49).

and no counsel moved for a mistrial before, during or after the incident.

In view of this record Gwynn's current claim that he was in some way prejudiced by this incident is, put simply, absurd. There was not the slightest indication, apart from a hearsay allegation by a defendant to his attorney, that the juror had spoken with a special agent,\* let alone that he had discussed any matter pending before the jury, notwithstanding Gwynn's totally unsupported assumption to the contrary in his brief. See *Mattox v. United States*, 146 U.S. 140, 148-50 (1892). As such, Gwynn was in no way prejudiced by the incident, and the trial court's actions in this matter were entirely proper. See *United States v. Burke*, 496 F.2d 373, 377 (5th Cir. 1974); *United States v. Pfingst*, 477 F.2d 177, 198-99 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); see also *United States v. Lubrano*, 529 F.2d 633, 638 (2d Cir. 1975); *United States v. Brasco*, 516 F.2d 816, 819 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975).

### POINT III

#### **The Trial Court Did Not Prejudice Gwynn When It Interrupted Counsel's Summation.**

Gwynn argues that the District Court prejudiced him, when the Court interrupted defense counsel's summation and required that the summation be completed the next morning. This claim is frivolous.

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\* The Government stated to the court that the special agent, who it was claimed was seen talking to the juror, did not even know who the jurors were as he was only present at the trial for one day to assist in the security of a large amount of cash (\$584,000) which the Government introduced into evidence that day. (Tr. 2939).

On October 20, 1975, Judge Cooper conferred with both sides and inquired concerning the amount of time each side needed for their closing arguments. The Government asked for approximately two and a half hours; the defense for eight hours. (Tr. 3438-40, 3522-24).

On the afternoon of the following day, summations began and continued until a recess for dinner at approximately seven o'clock. Mindful of the need to complete this five week trial expeditiously, Judge Cooper requested that defense summations be continued until eleven o'clock that evening. (Tr. 3774-75). After the jury returned from dinner, counsel for DeLutro, Magnano, and Soldano delivered their final arguments to the jury, which ended at approximately 10:45 o'clock. (Tr. 3686-3885). At this point Judge Cooper *asked* if any counsel wished to address the jury for the limited period of time remaining:

"The Court: Can any counsel amongst you get up and talk to the jury between now and eleven o'clock, a quarter of an hour. Is that possible. *I don't know whether you are inclined to do it.* I would like you to do it if you can. Mr. Lang, will you try it? If you find you have not completed all that comes to your mind, we will continue tomorrow.

Mr. Lang: Thank you." (Tr. 3885) (emphasis added).

Counsel for Gwynn then presented his summation to the jury until the trial judge interrupted him. Judge Cooper, however, advised him that he would get a full opportunity to finish the next morning. (Tr. 3885-92).

On the following day, October 22, 1975, Mr. Lang continued his arguments without interruption. (Tr. 3895-

98). Gwynn now contends that this procedure warrants a reversal of his well-warranted conviction.

Though Gwynn concedes that the District Court has "broad discretion in controlling and even restraining closing arguments" to the point of "controlling the duration and limiting the scope of closing summation," he argues, without reference to a single case, that this discretion does not include the right to interrupt counsel's summation to permit its completion the next day. (Br. 29). It is obvious, however, that the administration of a trial involving eight defendants and their counsel over a five week period is, at the very least, a difficult task. Interruptions of summations will occasionally be necessary. Moreover, here Judge Cooper did not *order* defense counsel to begin a summation he knew could not be completed that night. Rather, he *asked* defense counsel to begin with the understanding that an interruption might be necessary. Defense counsel in no way objected to this procedure.

Since no objection was raised to this procedure, and since it is likely that the failure to object was based on counsel's view that he would benefit by being permitted to address the jury again after it had had a good night's sleep, this claim must fail.

#### POINT IV

##### **There Was No Suppression of Any Evidence Favorable to Gwynn.**

Gwynn contends that the undisclosed testimony of two informants and the tape of a conversation between Gwynn and one of the informants (Finn) would have corroborated his defense. This claim is absurd.



Both informants, Finn and Fragliosi, had been killed before trial. (Tr. 1725).<sup>\*</sup> Their availability, accordingly, was beyond the Government's control. With respect to the tape Gwynn claims was suppressed, the Government made this tape available to the defense during the trial. (Tr. 1609, 1839).

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

FEDERICO E. VIRILLA, JR.,  
DOMINIC F. AMOROSA,  
LAWRENCE B. PEDOWITZ,  
*Assistant United States Attorneys,  
Of Counsel.*

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<sup>\*</sup> While this fact is not part of the record below, defense counsel was advised in a conversation with the Government attorneys that Fragliosi was garroted to death on June 11, 1957.

AFFIDAVIT OF MAILING

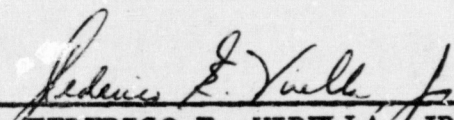
STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

FEDERICO E. VIRELLA, Jr. being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 26th day of January, 1977,  
he served <sup>copies</sup> ~~2 copies~~ of the within brief by placing the same  
in a properly postpaid franked envelope addressed:

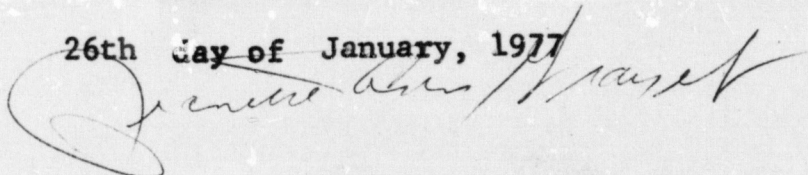
Zane and Zane  
Attorneys for Appellant  
One Rockefeller Plaza  
New York, New York 10020

And deponent further says that he sealed the said envelope  
and placed the same in the mail box for mailing at One St.  
Andrew's Plaza, Borough of Manhattan, City of New York.

  
FEDERICO E. VIRELLA, JR.

Sworn to before me this

26th day of January, 1977



JEANETTE ANN GRAYEB  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Commission Expires March 30, 1977